INDEX.

Subject Index.

Brief for appellants:	Page
Questions involved and specifications of error	2
Specification No. 1	2
Specification No. 2	4
Statement of case	5
Argument	11
Point I. Section 57, Chapter 88, Laws of Mississippi, 1930, page 162, unconstitutional as a burden upon interstate commerce	11
Point II. Section 63, Chapter 88, Laws 1930, page 163, unconstitutional, being (a) undue burden as to cotton in interstate commerce, and (b) a direct tax upon a Federal instrumentality	24
Appendix A	41
Appendix B	43

Table of Cases Cited.

A. G. S. R. Co. v. M'Fadden, 232 Fed. 1000 ..... 4, 22, 23
Anglo Chilean Nitrate Sales Co. v. Alabama, U. S. Advance Sheets, 77 L. ed. 459 ..... 2, 12
Alabama G. S. R. Co. v. M'Fadden & Bros., 232 F. 1003 19
Atchison, T. & S. F. v. Harold, 241 U. S. 371, 60 L. ed. 1050 37
Augusta Cotton Exch. v. G. & F. Ry., 146 I. C. C. 245 17
Ballard v. Miss. Cotton Oil Co., 81 Miss. 507 4
Binderup v. Pathe Exch., 263 U. S. 291, 309, 68 L. ed. 308, 316, 44 Sup. Ct. Rep. 96 37
Board of Trade v. Olsen, 262 U. S. 1, 67 L. ed. 837 ..... 3, 20, 22, 25
Board of Trustees of University of Illinois v. United States, U. S. Advance Sheets, 77 L. ed. 651 ..... 2, 12
Matthews v. Rogers, 284 U. S. 521 2
Bowman v. Continental Oil Co., 256 U. S. 646, 65 L. ed. 1144 ..... 4, 35
Brewster v. Gage, 280 U. S. 337, 74 L. ed. 463 ..... 3, 21
Budd v. New York, 143 U. S. 517, 36 L. ed. 247 15
B. & O. S. W. R. Co. v. Settle, 260 U. S. 166, 67 L. ed. 189 13
Cargill Company v. Minnesota, 180 U. S. 452, 45 L. ed. 619 14
Carson Petroleum Co. v. Vial, 279 U. S. 104, 73 L. ed. 631 .. 3, 14, 20, 22, 25
Chassaniol v. City of Greenwood, 148 Southern (Mississippi), page 781 15
Chicago Portrait Co. v. Bellingham, 270 Fed. 584 28
Cook v. United States, 77 L. ed. 404 ..... 3, 21
Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83 ..... 3, 16
Commission v. C. of G. Ry., 45 I. C. C. 516, 519 16

Page

Cotton from Tennessee River Landings, 120 I. C. C. 51..... 16
Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 136, 66 L. ed. 170. 3, 24, 35
Dahnke Walker Milling Co. v. Bondurant, 257 U. S. 282, 290, 291, 66 L. ed. 239..... 3, 33
Diamond Match Co. v. Village of Ontonagon, 188 U. S. 82, 47 L. ed. 394 41
Di Santo v. Pennsylvania, 273 U. S. 37, 71 L. ed. 527..... 40
Elwood Grain Co. v. Railway Co., 202 Fed. 845, 121 C. C. A. 153.... 19
Federal Trade Commission v. Pacific States P. T. Asso., 273 U. S. 64, 71 L. ed. 539..... 3, 13, 30
Flanagan v. Federal Coal Co., 267 U. S. 222, 69 L. ed. 583..... 37
Fuerst v. Brewster, 282 U. S. 494, 75 L. ed. 481..... 3, 13, 29
Gillespie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338..... 5
Greater New York Live Poultry, etc. v. United States, 47 Fed. (2d) 136..... 13, 33
Gregg Dyeing Co. v. Query, 286 U. S. 476, 76 L. Ed. 1236..... 17
Harrington v. Missouri Pacific R. Co., 254 Pac. (Kan.) 380.... 14, 20, 23
Henrietta Mills v. Rutherford County, 281 U. S. 121, 74 L. ed. 737.. 38
Hohenberg v. L. & N. R. Co., 46 Fed. (2d) 952, 955..... 4, 13, 20, 22, 23
Hump Hairpin Mfg. Co. v. Emerson, 258 U. S. 294, 66 L. ed. 625.... 24, 34
Independent Gin, etc. v. Dunwoody, 30 F. (2d) 307, 40 Fed. (2) 1.. 37
In re Cotton to Gulf Ports, 123 I. C. C. 685, 702..... 16
Jaybird Mining Co. v. Wier, 271 U. S. 609, 70 L. ed. 1114..... 5, 38
Johnson v. Maryland, 254 U. S. 51, 55, 65 L. ed. 126..... 4–5
Jones v. Hiawatha Gin & Mfg. Co., 17 Fed. (2d) 193..... 20
Kellogg v. Railway Co., 204 App. Div. 246..... 20, 23
Lawrence v. Commission, 286 U. S. 280, 76 L. ed. 1106..... 21
Lemke v. Farmers Grain Co., 258 U. S. 63, 66 L. ed. 461..... 3, 22, 30
Matthews v. Rogers, 284 U. S. 521..... 5, 40
McCullough v. Maryland, 4 Wheat, 316..... 4
M'Fadden v. A. G. S. R. Co., 241 Fed. 565..... 27
McFadden Rice Milling Co. v. T. & N. O. Ry. Co. (Tex.), 277 S. W. 193 40
McFadden & Bros. Agency v. A. & R. R. R., 126 I. C. C. 519..... 16
Merchants Exchange of St. Louis v. Missouri, 248 U. S. 365, 63 L. ed. 300 15
Miller v. G. M. & N. R. Co., 127 So. 692, 157 Miss. 69..... 2, 12
Miller v. Illinois Central R. Co., 111 So. 559, 146 Miss. 442..... 1, 12, 40
Missouri Pacific R. Co. v. Stroud, 267 U. S. 408, 69 L. ed. 385..... 22
Montgomery Cotton Exch. v. S. A. L. Ry., 109 I. C. C. 579, 582, 586 16
Munn v. People of Illinois, 94 U. S. 113, 24 L. ed. 77..... 14
National Lead Co. v. United States, 252 U. S. 140, 64 L. ed. 496..... 3, 20
New Jersey Tel. Co. v. State, 280 U. S. 346, 74 L. ed. 467..... 13, 40
New Orleans Cotton Exch. v. L. & N. R. R., 46 I. C. C. 712..... 16
Oil Company v. Central Railroad of Georgia, 204 Fed. 476..... 16
Oil Co. v. Burnett, Advance Sheets, 77 L. ed. 170..... 3, 21
Omaha Elevator Co. v. Union Pac. R. Co., 249 Fed. 832..... 18, 22

Page

Oregon-Washington R. & Nav. Co. v. Washington, 270 U. S. 87, 70 L. ed. 483 25
Ozark Pipe Line Corp. v. Monier, 266 U. S. 565, 69 L. ed. 443 36
People v. Perry, 291 Pac. (Cal.) 237 ..... 14, 22, 38
Pennsylvania R. Co. v. Commission, 250 U. S. 566, 63 L. ed. 1143 37
Railroad Commission v. C. B. & Q. Railroad, 257 U. S. 563, 588, 66 L. ed. 371, 22 A. L. R. 1086 22
Railroad Co. v. Dettlebach, 239 U. S. 588, 60 L. ed. 453 16
Savannah Traffic Bureau v. A. & R. R. R., 96 I. C. C. 749 16
Shafer v. Farmers Grain Co., 268 U. S. 198, 69 L. ed. 914 36
Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310 22
Southeastern Express Co. v. Miller, 264 U. S. 540, 68 L. ed. 841 37
Southern Pac. Co. v. Calexico, 288 Fed. 642 ..... 4, 13, 18, 22
Southern Railroad Co. v. Reed, 222 U. S. 424, 56 L. ed. 257 ..... 3, 16
Stafford v. Wallace, 258 U. S. 495, 66 L. ed. 735 ..... 3, 20, 21, 22, 25
State Tax Commission v. Interstate Natural Gas Company, 284 U. S. 41. 76 L. ed. 156 ..... 2, 12
State v. Grenada Cotton Compress, 85 So. 137, 123 Miss. 191 12
State v. S. A. & A. P. Ry. Co. (Texas), 73 S. W. 575 ..... 4, 19, 22, 28
Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276 ..... 3, 20, 22, 25
Swift & Co. v. Hocking Valley R. Co., 112 N. E. 212, 93 Ohio St. 143, 243 U. S. 281, 61 L. ed. 722 16
Texas Transport, etc. v. New Orleans, 264 U. S. 150, 68 L. ed. 611 37
Thomas Cotton Co. v. I. C. R. R., 63 I. C. C. 89, 92 16
T. & N. O. R. Co. v. Brotherhood, 281 U. S. 570, 74 L. ed. 1046 40
United States v. Erie Railroad Co., 280 U. S. 101, 74 L. ed. 206 14
United States v. Gosho Company, 23 Fed. (2) 675 ..... 4, 14, 20, 22, 23
Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181 37

STATUTES CITED.

Chapter 10, U. S. C. A., Vol. 7, Title Warehouses, Chapter 313, 39 Stat. at Large 3, 20
Chapter 88, Laws of Mississippi, 1930, Section 220, page 202; Section 227, page 205, Section 242, page 211 5
Chapter 106, 42 Stat. at Large, 1282, 7 U. S. C. A. 97 21
Chapter 366, Section (1), 46 Stat. at Large 1463, 7 U. S. C. A. Supplement, Chapter 10 ..... 3, 21
Interstate Commerce Act, Section 1, 49 U. S. C. A. page 11 ..... 2, 15
Section 57, Chapter 88, Laws of Mississippi, 1930, page 162 2
Section 63, Chapter 88, Laws of Mississippi, 1930, page 163 ..... 4, 21
United States Warehouse Act 4
United States Warehouse Act, August 11, 1916, Chapter 313, Section (1), 39 Stat. at Large, 486, 7 U. S. C. A. 97 ..... 3, 20
46 Stat. at Large 1463, Chapter 10, U. S. C. A., Vol. 7, Section 217 .. 4

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1933

No. 166

FEDERAL COMPRESS & WAREHOUSE COMPANY ET AL., APPELLANTS,

vs.

E. R. McLEAN, SHERIFF AND TAX COLLECTOR, APPELLEE.

BRIEF FOR APPELLANTS.

A.

Subject Index.

B.

Case Index.

C.

Federal Compress & Warehouse Company et al. v. *McLean,* unreported officially as yet (147 So. 325).

D.

Paragraph (1), Rule 12 of the Rules of this Court having been complied with, the concise statement of the grounds

on which jurisdiction is invoked is made part hereof by reference to save prolixity.

Questions Involved and Specifications of Error.

Specification No. 1.

Section 57, Chapter 88, Laws of Mississippi, 1930, page 162, providing:

> "COTTON COMPRESSES.—Upon each person operating a cotton compress, as follows:
> "Where the number of bales of cotton compressed per annum is 40,000 bales, or less, and more than 30,000 bales ..... $400.00",

is unconstitutional because a burden upon interstate commerce.

(1) State privilege taxes conditioning the right to engage in interstate commerce unduly burdened it.

Mississippi Cases: *Miller* v. *G. M. & N. R. Co.*, 127 So. 692, 157 Miss. 69; *Miller* v. *Illinois Central R. Co.*, 111 So. 559, 146 Miss. 442.

Federal authorities: *State Tax Commission* v. *Interstate Natural Gas Company*, 284 U. S. 41, 76 L. ed. 156; *Board of Trustees of University of Illinois* v. *United States*, U. S. Advance Sheets, 77 L. ed. 651; *Anglo Chilean Nitrate Sales Co.* v. *Alabama*, U. S. Advance Sheets, 77 L. ed. 459.

(2) Cotton compression interstate commerce.

(*a*) So held *Matthews* v. *Rogers*, 284 U. S. 521, by the Three-Judge Court.

(*b*) Interstate Commerce Act, Section (1), 49 U. S. C. A., page 11, under transportation includes all services in connection with receipt, delivery, elevation, transfer and handling of property transported.

Southern Railroad Co. v. *Reed,* 222 U. S. 424, 56 L. ed. 257; *Commission* v. *Diffenbaugh,* 222 U. S. 42, 56 L. ed. 83.

(*c*) Congress by enactment of Chapter 10, U. S. C. A., Vol. 7, Title Warehouses, Chapter 313, 39 Stat. at Large, preempted jurisdiction, applying principles of *Swift & Company* v. *United States,* 196 U. S. 375, 49 L. ed. 518, *Stafford* v. *Wallace,* 258 U. S. 495, 66 L. ed. 735, *Board of Trade* v. *Olsen,* 262 U. S. 1, 67 L. ed. 837, *Carson Petroleum Co.* v. *Vial,* 279 U. S. 104, 73 L. ed. 631, and that thereunder done is interstate commerce—

(*d*) Reenactment of material portions United States Warehouse Act, regulations there as to having been before made constituted Congressional approval with consequent integration departmental regulations into National legislation.

Chapter 366, Section (1), 46 Stat. at Large 1463, 7 U. S. C. A. supplement, Chapter 10. *National Lead Co.* v. *United States,* 252 U. S. 140, 64 L. ed. 496; *Brewster* v. *Gage,* 280 U. S. 337, 74 L. ed. 463; *Oil Co.* v. *Burnett,* Advance Sheets, 77 L. ed. 170; *Cook* v. *United States,* Advance Sheets, 77 L. ed. 404.

(*e*) What is interstate commerce determinable upon broad consideration of the substance of the whole transaction.

Federal Trade Commission v. *Pacific States, etc. Assn.,* 273 U. S. 64.

Commerce comprehends all component parts of commercial intercourse.

Fuerst v. *Brewster,* 282 U. S. 494, 75 L. ed. 481; *Dahnke Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290, 291, 66 L. ed. 239; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 63, 66 L. ed. 461; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 136, 66 L. ed. 170; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 104, 73 L. ed. 631.

Especially because:

(1) Appellant contractually sole instrumentality of interstate carrier for cotton delivered at Cleveland. (Tr., 85-86.)

(2) 75 per cent of cotton received by appellant previously delivered to interstate carrier and stopped in transit thereafter moving under through bill from original point of origin to interstate destination.

A. G. S. R. Co. v. *M'Fadden*, 232 Fed. 1000; especially *Hohenberg* v. *L. & N. R. Co.*, 46 Fed. (2) 955; *United States* v. *Gosho Company*, 23 Fed. (2) 675; *Southern Pac. Co.* v. *Calexico*, 288 Fed. 642; *State* v. *Ry. Co.*, 73 S. W. 575.

Severability of statute impossible.

Bowman v. *Continental Oil Co.*, 256 U. S. 646, 65 L. ed. 1144; *Ballard* v. *Miss. Cotton Oil Co.*, 81 Miss. 507.

Specification No. 2.

Section 63, Chapter 88, Laws of Mississippi, 1930, page 163, providing:

> "Cotton Warehouses.—Upon each person operating a warehouse for the storage of cotton, whether in conjunction with a compress or not, as follows:
>
> * * * * * * *
>
> "Where the storage capacity of same is 35,000 bales or less, and more than 20,000 ..... $75.00",

unconstitutional because

(1) An undue burden as to cotton in interstate commerce, the specifications whereof under No. 1 are not here reiterated to save prolixity.

(2) A direct tax upon a Federal instrumentality licensed under United States Warehouse Act.

46 Stat. at Large 1463, Chapter 10 U. S. C. A., Vol. 7, Section 217; *McCullough* v. *Maryland*, 4 Wheat. 316; *Johnson*

v. *Maryland*, 254 U. S. 51, 55, 65 L. ed. 126; *Jaybird Mining Co.* v. *Wier*, 271 U. S. 609, 70 L. ed. 1114; *Gillespie* v. *Oklahoma*, 257 U. S. 501, 66 L. ed. 338.

Statement of Case.

McLean, Tax Collector, called "Appellee", was sued by Federal Compress & Warehouse Company, called "Appellant" or "Company", to recover above mentioned privilege taxes, whose payment was a condition to the conduct of appellant's business.

Chapter 88, Laws of Mississippi, 1930, Section 220, page 202, Section 227, page 205, Section 242, page 211.

The taxes being paid under protest pursuant to rule in *Matthews* v. *Rogers*, 284 U. S. 521, this action at law was instituted for their recovery.

Summarizing the more outstanding facts, but referring to the agreed facts with exhibits as requisite to a complete factual background, we submit:

Cotton when picked is ginned, that is, the seed are removed from the lint, herein called cotton, which is then wrapped into a bale weighing approximately 500 pounds, whose dimensions are, length 5 feet, width 3½ feet, height 4¼ feet.

Appellant's plant is a warehouse for storage, wherein there is a mechanical compress designed to reduce the bale's thickness to 18 inches so that by space conservation the carriers, rail and water, in interstate and foreign commerce load approximately three times as much cotton in the same space by the increased density as would otherwise be possible.

Appellant is duly licensed under the United States Warehouse Act and all cotton passing there through during the last five years has been for interstate or foreign commerce except ten uncompressed bales.

At Cleveland there are approximately 25 buyers engaged in the sole business of buying, selling and shipping cotton in interstate and foreign commerce.

Upon receipt by appellant of cotton it issues tickets therefor, conforming to the United States Warehouse Act, whereunder appellant has been licensed since 1916. Cotton is sold only by transfer of such receipts as the sole evidence of ownership. Approximately 75 per cent of cotton received by appellant is delivered to it under its contract with the railroad company for the purpose of compression and awaiting determination of final destination extra Mississippi. When that is determined the cotton is loaded out after being compressed and the through rate from point of origin to point of destination is charged just as if there had been no interruption at Cleveland. These rates are published by the carrier under the Act to Regulate Commerce, specify compression at carrier's option as a privilege available, and the charge therefor approved by the Interstate Commerce Commission of 15¢ per 100 pounds is paid by carrier after compression from the through rate, such compression being requisite for the conservation of carrier's space. The price of the cotton is fixed by reference to that obtained on exchanges in foreign cities, made available telegraphically at Cleveland. The cotton is sampled and it is uniformly known that the buyer is purchasing solely for the purpose of causing the cotton to be transported to points outside of Mississippi, both in the United States and foreign countries where the cotton is utilized.

The Company's warehouse at Cleveland has a capacity of more than 20,000 and less than 35,000 bales, and compresses more than 30,000 bales, but less than 40,000 bales.

A map of the property is annexed as Exhibit "A" (Tr. 84a), and all property taxes have been paid.

It takes from two and a half to three cars of uncompressed cotton into a concentration point, compared with one car of compressed cotton outbound and the Railroad companies have employed this Company as its limited agent by contract marked Exhibit "B", the pertinent portion thereof being (Tr. 85-86):

> "The intent and purpose of this agreement, among other things, is to confirm the Compress Company AS THE LIMITED AGENT of the Railroad Company for the purpose of receiving cotton from the Railroad Company, delivering cotton to the Railroad Company, loading and unloading cotton from and into the cars of said Railroad Company, making proper delivery of cotton in the custody of said Compress Company so far as concerns the interest of the Railroad Company, and as principal TO FURNISH THE PREMISES FOR THE USE OF THE RAILROAD COMPANY AS A COTTON DEPOT under and subject to all of the terms and conditions of this agreement and the lawfully published tariffs and regulations of the Railroad Company from time to time in effect with respect to the transportation and handling of cotton."

Pursuant to this provision, plaintiff has performed and is still performing.

A typical movement is illustrated as to 36 bales, moving under Expense Bill No. 402, dated December 16, 1932, Exhibit "C". This shipment moved into Cleveland on a floating rate from Laughlin (also mispelled Loflin) of 17¢ per 100 pounds. The cotton was weighed, retagged, weight sheet issued and 36 individual warehouse receipts issued in the form of Exhibit "E". The cotton was sampled, classed into lots of even running grade and staple, placing that part of the 36 bales with other cotton according to its respective class, subsequently shipping out said 36 bales in interstate and foreign commerce, as follows: (Tr. 79)

January 18, 1932—5 bales in 27 bale shipment marked V A T P/M

destined to Mays Landing, N. J.

January 20, 1932—1 bale in 6 bale shipment marked V A P P/M

destined to Goldville, S. C.

January 22, 1932—32 bales in 50 bale shipment marked G A A P/M

destined to Manchester, England

February 16, 1932—4 bales in 6 bale shipment marked E A A T/M

destined to Mays Landing, N. J.

February 24, 1932—1 bale in 7 bale shipment marked N C A N

destined to Liverpool, England

February 27, 1932—1 bale in 14 bale shipment marked V A X P/M

destined to Goldville, S. C.

March 3rd, 1932—1 bale in 179 bale shipment marked D H N T

destined to Gunterville, Ala.

The warehouse receipts when the shipments were made were surrendered, the shipping order is shown as Exhibit "F", and it moved on bill of lading shown as Exhibit "H".

The cotton remains in the warehouse until it is desired to be shipped. The identity of each bale of cotton is not preserved in reshipping from concentration point; substitution is permitted with the understanding that the integrity of the through rate from original shipping point to ultimate destination is preserved.

The rules and regulations covering compression, as well as the amount to be paid for compression is covered by Y. & M. V. tariff No. 44-G, I. C. C. No. 6828 and supplement No. 20, Exhibit "J", which has been regularly published

in pursuance of the Act to Regulate Commerce. The compression charge of 15¢ is paid by the carrier. An example of the movement is given (Tr. 80):

> "Below is an example showing how the Interstate rate applies to the five bales of cotton marked V A T P/M which originated in this 36 bale shipment:
>
> "It was shipped from Laughlin, Miss., to Cleveland, Miss., for the purposes mentioned herein and a floating—in rate of 17¢ per cwt. assessed. We find a through rate quoted from Laughlin, Miss., via Cleveland, Miss., to Mays Landing, N. J., *on carriers privilege of compression* of $1.17 per cwt. In the shipping of these five bales of cotton and the prepaying of the total amount of freight due (using 500 pounds to the bale) which is $5.85 per bale, there was delivered to the Railroad a freight bill covering the movement of five bales of cotton into Cleveland, Miss., for which a charge of 85¢ per bale (using 500 pounds to the bale) was assessed, and the Railroad accepted the freight bill for the full value thereof, and the shipper paid to them the difference between the rate of freight quoted from Laughlin, Miss., to Mays Landing, N. J., and the amount paid for the movement of the cotton from Laughlin, Miss., to Cleveland, Miss., which is $1.00 per cwt., or $5.00 per bale, and *out of the latter rate the Railroad paid the Cleveland compress* 15¢ per cwt. or 75¢ per bale for *compressing the cotton.*"

The Company has complied with all of the provisions of the United States Warehouse Act and all cotton shipped from it except ten bales during the last five years has been to interstate and foreign points.

The history of the introduction of cotton is then traced thus (Tr. 81):

> "Cotton was introduced, as it is thought, into Mississippi by the French, who are assumed to have bought it from San Domingo, and its first historical appear-

ance is at a garden at Natchez, in 1722. By 1820 Mississippi had become a substantial grower of cotton. By 1830 it was producing approximately 100,000 bales annually. 1840 it lead all of the states in the production of cotton with 380,803 bales. Then came the Civil War with the disorganization incident thereto. However, by 1869 it was enabled to produce in that year 451,950 bales, and 1879, 963,111 bales. In 1889 it produced 1,154,725 bales, ranking third among the states of the American Union, Texas being first, Georgia second. 1899 Mississippi produced 1,313,798 bales, with Texas first, and at present time the State is regarded as the second in the production of cotton as compared with the other states of the American Union.

"Annexed as Exhibit "K" is a statement showing the years beginning 1901, acres harvested, the yield in Mississippi and the total yield in Continental United States. The consumption of cotton in Mississippi is as shown by Exhibit "L" hereto annexed, but the number of active spindles in 1930 was only 131,284, but there has been a tendency for more spindles to become active. The total number of bales of cotton consumed by these mills does not come all from Mississippi. The proportion arising in Mississippi is impossible to ascertain, but by far the greater part is Mississippi cotton.

"Cotton is the great cash crop of Mississippi and has been so for many years last past. Cotton not consumed in Mississippi is exported from Mississippi."

"The general and uniform custom among buyers * * * as well as the general course of business is that a buyer enters into a contract either for the future or immediate delivery of a certain number of bales of cotton of a certain class, grade and staple, obligating himself by contract to deliver to a mill in a foreign state or country (Tr. 59) such cotton at a given price." Thereupon, the buyer goes upon the market and purchases cotton "of the kind and character which he is obligated to his customer to deliver, and will cause the delivery of said cotton in interstate and/or foreign commerce in accordance with the terms of his contract." A small portion is bought "when no contract

for the sale thereof exists, but, in such cases, it is bought with the sole anticipation * * * to procure a sale of said cotton to some foreign mill or foreign cotton merchant and to cause the same to be transported in interstate and/or foreign commerce * * * at such times as market conditions will justify.

"In the purchase of cotton as above set forth a small proportion of the cotton was purchased varying from one per cent to ten per cent constituting what is known in the cotton trade as 'overs', 'or cotton which does not fit' and said overs arising from reclassification, rejection and preparation. As an incident to the purchase and shipment of this cotton by buyer and seller, the same is sold locally, this small percentage of cotton for which they have no use, but which said latter cotton is eventually shipped out of the State of Mississippi by other cotton buyers of the same class for delivery on orders which they may have for cotton of this particular grade, type or staple."

Appellant's operation has been under bond and license from the Secretary of Agriculture, whose rules are annexed as an exhibit, appellant having made all reports as to condition, contents and operation thereunder required. The privilege taxes having been paid under protest this suit was brought for recovery, which the Circuit Judge denied and the Supreme Court affirmed his ruling, as appears in the opinion heretofore adverted to.

ARGUMENT.

Point I.

Section 57, Chapter 88, Laws Mississippi, 1930, Page 162, Unconstitutional as a Burden Upon Interstate Commerce.

Segregating the compression, which is not specifically mentioned in the United States Warehouse Act, and dealing therewith under the Warehouse tax, we submit:

(1) *State privilege taxes conditioning the right to engage in interstate commerce unduly burdened it.*

By prescribing the tax upon every bale compressed, the entire business was taxed. *State v. Bermuda Cotton Compress*, 85 So. 137, 123 Miss. 191.

Interstate and foreign commerce may not be burdened by a State privilege tax which, if not paid, makes engaging in interstate commerce a crime.

Miller v. C. M. & N. R. Co., 127 So. 402, 157 Miss. 69; *Miller v. Illinois Central Railroad Co.*, 111 So. 559, 146 Miss. 442; *State Tax Commission v. Interstate Natural Gas Co.*, 284 U. S. 41, 76 L. ed. 156; *Board of Trustees of University of Illinois v. United States*, U. S. Advance Sheets, 77 L. ed. 651; *Anglo Chilean Nitrate Sales Co. v. Alabama*, U. S. Advance Sheets, 77 L. ed. 459.

The narrow issue here, therefore, is was that done by appellant at its compress plant in whole or in part, excluding the Federal Warehouse feature, whereof later, interstate commerce. We unhesitatingly affirm that it was. The Supreme Court of Mississippi, however, held it was not so, saying thereanto:

> "This (entering into commerce) did not occur until it was delivered to the railroad *after being compressed* for transportation * * *. The assembling of the cotton in the warehouse and its compression are acts preliminary, convenient for, but not absolutely essential to its transportation to other states or countries."

citing therefor:

(a) *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715.

The issue there was narrow:

> "Are the products of a state, although intended for exportation to another state and partially prepared for that purpose by being deposited at a place or port of

shipment within the state, liable to *be taxed like other property within the state*."

(Italics ours unless otherwise noted.)

The court there was dealing with ad valorem taxation upon property actually situated within the state at the time of the incidence of the tax. Compare *New Jersey Tel. Co. v. State*, 280 U. S. 346, 74 L. ed. 467. That here at issue is an absolute prohibition of compression unless compliance is had with a license tax, compression without license being a crime, valid. The state court saying that it was not "*absolutely essential to its transportation to other states or countries*," but unless compressed business, as is could not be done.

Commerce comprehends all of the component parts of commercial intercourse between different states. *Purcell v. Brewster*, 282 U. S. 498, 75 L. ed. 481. And what is interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Federal Trade Commission* v. *Pac. States, etc. Assn.*, 273 U. S. 64, 71 L. ed. 539. "To hold that it could not be compressed before shipment would be to hold in effect that it could not be shipped at all * * * without being subjected to the burdens of the State government." *Southern Pacific Co. v. Calerion*, 288 Fed. 642.

"And though it moved (as to 75%) under a local bill of lading * * * into Montgomery, where it was concentrated, compressed and reshipped by rail to the port of export, it was interstate commerce from the beginning and properly subject to the combination of interstate rates from the point of origin to concentration point, and thence to destination." *Hohenberg v. L. & N. R. Co.*, 46 Fed. (2) 952, at 955, following *B. & O. S. W. R. Co. v. Settle*, 260 U. S. 166, 67 L. ed. 189. *Greater New York, etc. v. United States*, 47 Fed. (2) 156.

The rate for this movement was published under the Interstate Commerce Act Appellant acted as the local receiving agent of the carrier for this cotton. Its charges for compression were approved as a privilege under Carrier's privilege tariff and the carrier in collecting for the interstate shipment paid for its space conservation, rendering the movement possible, the rate approved by the Interstate Commerce Commission and the carrier so thus paying for that by appellant done was under the Commerce Act engaging in interstate transportation and all parties have so considered from time out of mind.

Compare *Carson Petroleum Co.* v. *Vial*, 279 U. S. 104, 73 L. Ed. 631; *United States* v. *Erie Railroad Co.*, 280 U. S. 101, 74 L. ed. 206; *United States* v. *Gosho Company*, (5 C. C. A.) 23 Fed. (2) 675; *Harrington* v. *Missouri Pacific R. Co.*, 254 Pac. (Kan.) 380; *People* v. *Perry*, 291 Pac. (Cal.) 237.

(*b*) *Diamond Match Co.* v. *Village of Ontonagon*, 188 U. S. 82, 47 L. Ed. 394, which likewise involved property, not privilege taxation, and held merely that logs in a boom from which they were subsequently to be shipped were not while awaiting delivery in interstate commerce. Therefrom we do not dissent.

(*c*) *Munn* v. *People of Illinois*, 94 U. S. 113, 24 L. Ed. 77, is the leading case establishing that the state might fix maximum prices for grain storage.

(*d*) *Cargill Company* v. *Minnesota*, 180 U. S. 452, 45 L. Ed. 619, involved the license operative for inspection purposes, whose cost was $1.00 per year, and the chief question was under the 14th Amendment with a factual background fundamentally different. There was no interference with or burden upon commerce thereby.

(*e*) *Merchants Exchange of St. Louis* v. *Missouri*, 248 U. S. 365, 63 L. Ed. 300, involved an inspection law of Missouri with a fundamentally different factual background.

(*f*) 12 C. J., pp. 38, 94, 103, but Section 142 thereof correctly states the rule:

> "A state may not regulate or burden interstate commerce and * * * taxation of interstate commerce is a prohibited form of regulation * * * a state may not require the taking out of a license and the payment of a tax for the privilege of engaging in and carrying on interstate commerce,"

and further held, following *Budd* v. *New York*, 143 U. S. 517, 36 L. Ed. 247, that warehouses may "become connected with interstate commerce."

With these obvious differentiations, we submit the decision of the Mississippi Court palpably erroneous because

(1) *Upon an identical factual background the District Court in* Matthews *v.* Rogers, supra, *held that done interstate commerce and the privilege tax void.* Compare *Chassaniol* v. *City of Greenwood*, 148 Southern (Mississippi), page 781.

(2) *By the Interstate Commerce Act, Section 1, 49 U. S. C. A., page 11, it is declared:*

> "The term '*transportation*' as used in this chapter shall include locomotives * * * and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, *and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.*"

This means not only the *physical instrumentalities* but all *services* in connection with receipt, delivery and han-

dling. *Southern Railroad Co. v. Reed*, 222 U. S. 424, 56 L. ed. 257; *Swift & Co. v. Hocking Valley R. Co.*, 112 N. E. 212, 93 Ohio St. 143, 243 U. S. 281, 61 L. ed. 722. Compare *Railroad Co. v. Dettlebach*, 239 U. S. 588, 60 L. ed. 453.

In *Commission v. Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83, *Oil Company v. Central Railroad of Georgia*, 204 Fed. 476, compare Interstate Commerce Commission, in I. C. C. Docket No. 14940, Appendix A.

Concentration and compression has been regulated as interstate commerce. *Thomas Cotton Co. v. L. C. R. R.*, 63 I. C. C. 89, 92; *Commission v. C. of G. Ry.*, 45 I. C. C. 516, 519.

Concentration and compression of cotton are of benefit to carriers in the saving of equipment, movement into the concentration points being largely in less than car load lots, and from the concentration points in carloads, compressed cotton occupying substantially less space than uncompressed cotton. *Montgomery Cotton Exch. v. S. A. L. Ry.*, 109 I. C. C. 579, 582, 586. And as further said "Concentration in transit, like compression in transit reduces rather than increases carrier's expenses of transportation." In re *Cotton to Gulf Ports*, 123 I. C. C. 685, 702. And as said in *Savannah Traffic Bureau v. A. & R. R. R.*, 96 I. C. C. 749:

> "The real purposes of compression of cotton in *transit at the expense of the carrier are conservation of equipment and economy of transportation.*"

Under so-called carrier's privilege rates compression is not a transportation service for the shipper, and no obligation rests upon the carrier to perform the service or to pay therefor, except as its compression aids interstate commerce. *New Orleans Cotton Exch. v. L. & N. R. R.*, 46 I. C. C. 712; *Cotton from Tennessee River Landings*, 120 I. C. C. 51; *McFadden & Bros. Agency v. A. & R. R. R.*, 126

I. C. C. 519; *Augusta Cotton Exch.* v. *G. & F. Ry.*, 146 I. C. C. 245.

As was said in General Rate Structure Investigation, 17000, Part 3, Cotton, Page 605:

> "In the Mississippi Valley, on the other hand, which is more remote from consuming territory, a much larger proportion of the cotton, perhaps as much as 95 per cent, is compressed in transit by the carriers."

In the same case, page 628, the Commission further held:

> "These bases are made in the light of the existing compress charge east of the river of 15 cents, but this is not to be regarded as the expression of any opinion as to the propriety of the amount of that charge. Any change in the prevailing compress charge should be accompanied by a corresponding revision of the rates."

Thus, therefore, under this precise provision of the Commerce Act, Compression is had at the sole expense of the carrier and is paid for by the carrier to the press out of the through rate and thus as the consumer pays the tax this burden is passed directly to the carrier. *Gregg Dyeing Co.* v. *Query*, 286 U. S. 476, 76 L. Ed. 1236.

Note (Tr., 64):

> "And the amount paid for the movement of the cotton from Laughlin to Cleveland, Miss., which is $1.00 per cwt., or $5.00 per bale, and out of the latter rate the Railroad paid the Cleveland Compress 15¢ per cwt. or 75¢ per bale for compressing the cotton. Which is a direct imposition on that act in interstate commerce compression and so being may not be taxed by a license. *Pullman Co.* v. *Adams*, 189 U. S. 420, 47 L. Ed. 877."

Immediately preceeding page 167, Exhibit J, the name Laughlin is shown under Index No. 102, and Tariff No.

444 G, I. C. C. No. 6828 immediately follows for "Compression and Shipment" as underscored in red, and under rules show it governs "the handling of uncompressed cotton under this tariff as amended *to be compressed at Cleveland, Miss., and forwarded via Yazoo, etc. Railway.*" The Court will further notice special provision for compression in case of emergency, and on page 4 thereof, likewise in red, is shown the privilege under Rule 12 thus:

> "(a) Maximum allowance to compresses for compressing cotton, cotton linters or regins, in standard rectangular bales, will be fifteen (15) cents per 100 pounds.
>
> "(b) The amount to cover cost of compressing (not in excess of 15 cents per 100 pounds) included in the through rate, from point of origin (shown on inbound paid freight bill surrendered) to destination, will be deducted from proportion applying from Cleveland, Miss., to destination, and paid only to the compress company performing the service of compressing."

Therefore, under this precise published rate, this compression charge has been fixed as an integral element of the interstate movement and yet as such it is hereunder taxed.

In *Southern Pac. Co. v. Calexico*, 288 Fed. 642.

In *Omaha Elevator Co. v. Union Pac. R. Co.*, 249 Fed. 832, the Court said:

> "The facilities furnished by plaintiff were within the terms of the act to regulate commerce. If there ever existed any doubt as to this, such doubt was removed by the Hepburn amendment. *Penn Co. v. U. S.*, 236 U. S. 351, 362, 35 Sup. Ct. 370, 59 L. Ed. 616. Unless the allowance were covered by a published and filed rate schedule, they could not legally be collected. *Railway Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; *Railroad Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297,

34 L. R. A. (N. S.) 671; *Elwood Grain Co.* v. *Railway Co.*, 202 Fed. 845, 121 C. C. A. 153."

State v. *S. A. & A. P. Ry. Co.* (Tex.), 73 S. W. 575; *Alabama G. S. R. Co.* v. *M'Fadden & Bros.*, 232 F. 1003, where the Court said as to compression:

"I fail to see how the shipments from Albertville to Birmingham under the circumstances of the present case, can be construed as intrastate. The stoppage in transit for compression at Birmingham, the assembling of the cotton originating at Albertville with other cotton purchased at Birmingham and other points in Alabama, and the subsequent routing of the compressed cotton to points determined by the defendants according to their trade contracts, do not relieve the shipments originating at Albertville and billed to Birmingham, and subsequently billed from Albertville or Attalla to New Orleans, of their character as interstate commerce. There was no change of ownership from the time the cotton left Albertville until its arrival at New Orleans. It was continuously in the possession, custody, and control of the carrier, and the stoppage of the cotton at Birmingham for compression, still in the possession of the carriers, was merely *for a service incidental to its transit over the entire interstate route.*

"That the essential character of the commerce, not its mere accidents, such as its billing, its handling and concentration at Birmingham, or the loss of identity of the actual cotton shipped from Albertville, determines its interstate character, is no longer open to dispute. *Texas & New Orleans Railroad Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004."

United States v. *Gosho Co.* (5 CCA), 23 F. (2d) 675. *Compare Kellogg* v. *Railway Co.*, 204 App. Div. 246; *Harrington* v. *Missouri Pac. R. Co.* (Kan.), 254 Pac. 380. Without compression interstate and foreign commerce as now existent would perish off the earth, become impossible. *Hohenberg* v. *L. & N. R. Co.*, 46 F. (2d) 952, 955.

(c) *Congress by enactment of Chapter 10, U. S. C. A., Vol. 7, Title Warehouses, Chapter 313, 39 Stat. at Large, preempted jurisdiction.*

By the United States Warehouse Act, August 11, 1916, Chapter 313, Section (1), 39 Stat. at Large, 486, 7 U. S. C. A. 97, Congress preempted this field by declaring:

> "The term 'Warehouse' * * * shall be deemed to mean every building * * * in which any agricultural product is or may be stored for interstate or foreign commerce * * *."

Compare *Jones* v. *Hiawatha Gin & Mfg. Co.*, 17 Fed. (2d) 193, in which District Judge Holmes took judicial knowledge that nearly all cotton produced in Mississippi finds its way into interstate commerce and that as to such storage Congress possessed plenary power under the Commerce Clause of the Constitution.

The validity of this United States Warehouse Act is not challenged, the things thereat done under the regulations of the Department of Agriculture are not claimed to be usurpations, and with the knowledge of Congress, this course has been pursued for nearly 20 years.

National Lead Co. v. *United States, supra; Swift & Company* v. *United States*, 196 U. S. 375, 49 L. Ed. 518; *Stafford* v. *Wallace*, 258 U. S. 495, 66 L. Ed. 735; *Board of Trade* v. *Olsen*, 262 U. S. 1, 67 L. Ed. 837; *Carson Petroleum Co.* v. *Vial*, 279 U. S. 104, 73 L. Ed. 631.

(d) Reenactment of material portions United States Warehouse Act, regulations thereasto having been before made constituted Congressional approval with consequent integration departmental regulations into National legislation.

Upon August 11, 1916, cognizant of potential power existing under the Commerce clause and of the requisite exertion thereof demanded by the public welfare, Congress passed the United States Warehouse Act and thereafter, upon February 23, 1923, Chapter 106, 42 Stat. at Large, 1282, 7 U. S. C. A. 97, and upon March 2, 1931, Chapter 366, Section (1) et seq., 46 Stat. at Large, 1463, U. S. C. A. 1932 Supplement, page 12, amended to coordinate with that then deemed requisite, and with the knowledge of the departmental regulations then existent thereby these were integrated into national law.

Brewster v. *Gage*, 280 U. S. 337, 74 L. Ed. 463; *Oil Co.* v. *Burnett*, U. S. Advance Sheets, 77 L. Ed. 170; *Cook* v. *United States*, 77 L. Ed. 404.

(e) What is interstate commerce determinable upon broad consideration of the substance of the whole transaction.

"Commerce among the states is not a technical legal conception but a practical one drawn from the course of business." *Stafford* v. *Wallace*, 258 U. S. 495, 66 L. Ed. 735, and, "in passing on the constitutionality this Court is concerned only with its practical operation, not the precise form of descriptive words which may be applied to it." *Lawrence* v. *Commission*, 286 U. S. 280, 76 L. Ed. 1106, and "Commerce is a unit and does not regard state lines, and while under the Constitution interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that

the supreme authority, the nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority." *Railroad Commission* v. *C., B. & Q. Railroad*, 257 U. S. 563, 588, 66 L. Ed. 371, 22 A. L. R. 1086.

"There can be no divided authority over interstate commerce. * * * The Acts of Congress on that subject are supreme and exclusive." *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 408, 69 L. Ed. 385.

We rely confidently upon principles announced in *Swift & Company* v. *United States*, 196 U. S. 375, 49 L. Ed. 518, as a milestone in the interpretation of the commerce clause of the Constitution.

Stafford v. *Wallace*, 258 U. S. 495, 66 L. Ed. 735; *Board of Trade* v. *Olsen*, 262 U. S. 1, 67 L. Ed. 837; *Carson Petroleum Co.* v. *Vial*, 279 U. S. 104, 73 L. Ed. 631, quoting to approve *Southern Pac. Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 53. Compare *Southern Pac. Co.* v. *Calexico*, 288 Fed. 642; *Omaha Elevator Co.* v. *Union Pacific R. Co.*, 249 Fed. 862; *State* v. *S. A. & A. P. Ry. Co.*, 73 S. W. 575; *A. G. S. R. Co.* v. *McFadden*, 232 Fed. 1003; *United States* v. *Gosho Co.*, 23 Fed. (2d) 675; *Hohenberg* v. *L. & N. R. Co.*, 46 Fed. (2d) 952.

We refer to *People* v. *Perry* (Cal.), 291 Pac. 237, appended in its pertinent portions as Appendix B hereto.

Whereunder, consider:

(1) Appellant is contractually sole instrumentality of interstate carrier for cotton delivered at Cleveland (Tr. 85-86).

Appellant contracted with the carrier so as to become as to cotton the carrier's sole instrumentality of receipt

and delivery at Cleveland, the pertinent portion of the contract thereunto being heretofore quoted, page 7.

(2) 75% of cotton received by appellant previously delivered to interstate carrier and stopped in transit thereafter moving under through bill from original point of origin to interstate destination.

Compare *Hohenberg* v. *L. & N. R. Co.*, 46 Fed. (2d) 952, 955:

> "The cotton without dispute was originally intended for export, with transit privileges at Montgomery, and though it moved under a local bill of lading from Greenville and other points into Montgomery where it was concentrated, compressed and reshipped by rail to the port of export, it was interstate commerce from the beginning and properly subject to the combination of interstate rates from the point of origin to concentration point, and thence to destination." (Citing cases.)

Greater New York Live Poultry, etc. v. *United States*, 47 Fed. (2d) 156; *United States* v. *Gosho Company*, 23 Fed. (2d) 675; *A. G. S. R. Co.* v. *McFadden*, 232 Fed. 1003; *Kellogg* v. *Railway Co.*, 204 App. Div. 246; *Harrington* v. *Missouri Pacific R. Co.*, 254 Pac. 380.

The movement of cotton from Mississippi through appellant's plant to the outside world is interstate commerce, the plant being an integral element in an ever-moving stream whose motion is kept constant by the facilities enjoyed, whereover under the Interstate Commerce Act the Commission has constantly exercised supervision and seen to it that the carrier functioning in this movement has not transgressed the law and when the cotton was initially received by the carrier for transportation with privilege of concentration and compression at carrier's option at Cleveland, the interstate journey had begun.

Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 136; 66 L. Ed. 170; *Hump Hairpin Mfg. Co. v. Emerson*, 258 U. S. 294.

POINT II.

Section 63, Chapter 88, Laws 1930, Page 163, Unconstitutional, Being (a) Undue Burden as to Cotton in Interstate Commerce, and (b) a Direct Tax Upon a Federal Instrumentality.

(a) *Undue burden upon interstate commerce.* All argument under Point I inserted by reference here to save prolixity.

(b) *A direct tax upon a Federal instrumentality.*

Congress, pursuant to the Commerce clause of the Federal Constitution, which provides, Article 1, Section 8, subdivision 3:

> "To regulate commerce with foreign nations and among the several states,"

found it requisite therefor to enact this Chapter upon warehouses, Chapter 40, entitled "United States Warehouse Act," whereunder and in accordance wherewith since 1916, this warehouse, independent of the Compress, has been consistently and continuously operated and with reference to the interstate features and the burdening thereof under this subdivision certain cases are cited whereto we ask the Court to make reference in considering Point I, for while pertinent to both, they are more pertinent here, and are not cited twice to save prolixity. This warehouse act could be unconstitutional if it did not service and serve that which was and truly is interstate commerce. Congress has declared it so and we assume no one questions now its validity in being solely to accommodate interstate commerce in cotton.

When Congress pursuant to paramount power acts, it preempts thereby the entire field. *Oregon Washington R. & Nav. Co.* v. *Washington*, 270 U. S. 87, 70 L. Ed. 483.

In *Board of Trade* v. *Olsen*, 262 U. S. 1, 67 L. Ed. 837, at page 850, Mr. Chief Justice Taft reviewed the entire question and declared as to the case of *Swift & Co.* v. *United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276:

> "That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and developments in the business of this vast country, and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of great interstate movement, which, *taken alone, were intrastate, to characterize the movement as such. The Swift Case merely fitted the commerce clause to the real and practical essence of modern business growth.*"

Compare *Stafford* v. *Wallace*, 258 U. S. 495, 66 L. Ed. 735. Compare *Carson Petroleum Co.* v. *Vial*, 279 U. S. 104, 73 L. Ed. 631, where, among other things, the Supreme Court said:

> "Since its decision this Court has had to consider several cases where there was transshipment of the commodity from local carriage in a state to a ship at an export port and conveyance thence to a foreign destination. There has been a liberal construction of what is continuity of the journey, in cases where the court finds from the circumstances that export trade has been actually intended and carried through.
>
> "In *Southern P. Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. Rep. 279, cotton oil cake and meal destined for export was bought by the intending exporter in Texas, Oklahoma, and Louisiana. It was shipped to him on bills of lading and waybills showing the point of origin in those states and the destination at Galves-

ton. The purchases were made for export, there being no consumption of the products at Galveston. His sales to foreign countries were sometimes for immediate and sometimes for future delivery, irrespective of whether he had the product on hand at Galveston. At times he had it on hand. At other times orders must be filled from cake or meal to be purchased in the interior or then in transit to him. When the cake reached Galveston it was ground into meal and sacked by the exporter, and for the meal thus ground and such meal as had been brought in ground form he took out ships' bills of lading made to his order. The court said (p. 526):

" 'The manufacture or concentration on the wharves of the terminal company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bill of lading or whether their initial point was Galveston, or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose.' "

This rest in the warehouse was but an incident of interstate commerce for the journey had been as to 75 per cent of the cotton actually begun by delivery to the rail carrier and receipt by this appellant in pursuance of a provision in its contract with the carrier of that cotton for the railroad company.

Compare (Tr. 70 et seq.) the agreed statement of facts, Exhibit D:

> "The intent and purpose of this agreement, among other things, is to confirm the Compress Company as the Limited Agent of the Railroad Company for the purposes of receiving cotton from the Railroad Company, delivering cotton to the Railroad Company, loading and unloading cotton from and into the cars of said Railroad Company, making proper delivery of cotton in the custody of said Compress Company so far as concerns the interest of the Railroad Company, and as principal to furnish the premises for the use of the Railroad Company as a cotton depot under and subject to all of the terms and conditions of this agreement and the lawfully published tariffs and regulations of the Railroad Company from time to time in effect with respect to the transportation and handling of cotton."

Thereat the warehouse was an instrumentality of transportation for the railroad company itself, which had begun the journey under laden of this cotton, and was obligated to move it from this place of temporary rest to ultimate destination as soon as determined and take for its service a compensation admeasured as from the initial point of origin and not from Cleveland.

In *M'Fadden* v. *A. G. S. R. Co.*, 241 Fed. 565, the Court of Appeals of this Circuit said:

> "Goods actually destined for points beyond the state of origin are necessarily in interstate commerce when they are delivered to the carrier and start in the course of transportation to another state. *Coe* v. *Errol,* 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715. This is true whether the goods are shipped on through bills of lading or on initial bills only to a terminal within the same state, where they are transshipped and thereafter transported on new bills of lading to a destination beyond the state. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and Young,* 219 U. S. 498, 527, 31 Sup. Ct. 279, 55 L. Ed. 310; *Texas &*

New Orleans R. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; *Ohio R. R. Commission* v. *Worthington*, 225 U. S. 101, 32 Sup. Ct. 652, 56 L. Ed. 1004."

Compare *Chicago Portrait Co.* v. *Bellingham*, 270 Fed. 584.

In *State* v. *S. A. & A. P. Ry. Co.* (Texas), 73 S. W. 575, it is said:

"We take it for granted that no one will insist that the stoppage of cotton en route for compression alone would transform a foreign-billed shipment into a domestic one. Appellant appears to contend that classification, reweighing, and remarking had that effect on this shipment. Breyer's place of business was in Houston. He was engaged in buying cotton at different points in the state for export. He clearly had the right to compress; also to classify and grade his purchases according to the requirements of the particular consignment he desired to make; also he had a right to ship cotton from the points of purchase by foreign bills of lading. It is also clear that he could not classify and grade several lots of cotton, bought at different points, without collecting them at some point. And to our minds it is clear, also, that the act of classifying as it was done in this instance, at a central point on the lines of these several shipments, was not in any sense an act of preparation or perfection of the cotton for market. Nothing was done to the article itself, but to compress it, and as compressed it went on. It was already destined abroad (that is, all the lots of cotton from which the substitutions were made were under export bills to the same destination, and all were actually exported); and we think it should be held, under the circumstances, that the mere shifting of bales from one bill of lading to another was immaterial, and did not interrupt the foreign nature of the several shipments. One of the regulations of the commission seems to recognize that cotton may be concen-

trated through shipments at some point, and there classified, without constituting such shipments domestic, unless, in addition to such concentration and classification preparatory to final destination, it is brought to that point to determine the point of final destination. Section 4, Commodity Tariff, I-B, Sixty Annual Report Railroad Commission of Texas, p. 48. And it is uncontroverted that the final destination of this cotton was determined before the cotton was started from Yorktown. This appears to signify that, in the opinion of the commission, a foreign shipment does not lose that character by a classification of cotton en route. And it has been held that coal mined in a state, and started to another state, but stopped for separation and assortment, does not thereby lose its character as an interstate shipment. *State ex rel.* v. *Engle*, 34 N. J. Law, 425. We conclude that none of the said acts was sufficient to transform this into a local shipment."

In dealing with interstate commerce, compare *Furst* v. *Brewster*, 282 U. S. 498, 75 L. Ed. 481:

"Such commerce comprehends all the component parts of commercial intercourse between different states, and, according to established principle, any State statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the common clause. *Crutcher* v. *Kentucky*, 141 U. S. 47, 57, 35 L. Ed. 649, 652, 11 S. Ct. 851; *Western U. Teleg. Co.* v. *Kansas*, 216 U. S. 1, 27, 54 L. Ed. 355, 366, 30 S. Ct. 190; *Dahnke-Walker Mill Co.* v. *Bondurant*, 257 U. S. 282, 290, 291, 66 L. Ed. 239, 243, 244, 44 S. Ct. 106. Accordingly, when a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the State cannot, consistently with the limitation arising from the commerce clause, obstruct the attainment of that

purpose. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 204, 59 L. Ed. 193, 197, 35 S. Ct. 57."

If the state had authority thus to tax and prohibit the assembly of cotton at appellant's plant, it had the authority to prohibit appellant thereat from doing that requisite thus to afford this movement in interstate commerce. This power to tax involved the power to prohibit and if there be the power to prohibit, then, as to this movement in cotton, requisite for national and interstate welfare, Mississippi became paramount, and the United States subordinate, and in the determination of that which is interstate commerce, the court said in *Federal Trade Commission* v. *Pacific States P. T. Asso.*, 273 U. S. 64, 71 L. Ed. 539:

"And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier* v. *Ala.* 218 U. S. 124, 128, 54 L. Ed. 965, 967, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one state to another. *Dahnke-Walker Mill Co.* v. *Bondurant*, 257 U. S. 282, 290, 66 L. Ed. 239, 243, 42 Sup. Ct. Rep. 106; *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 55, 66 L. Ed. 458, 462, 42 Sup. Ct. Rep. 244."

We with confidence rely upon the case of *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 53, 66 L. Ed. 461, where it was said:

"We pass to a consideration of the merits. The record discloses that North Dakota is a great grain-growing state, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant, and other buyers of like character, are own-

ers of elevators and purchasers of grain bought in North Dakota, to be shipped to and sold at terminal markets in other states, the principal markets being at Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by complainant. The Minneapolis prices are received at the elevator of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his 'spread,' or margin, of profit. The purchases are generally made with the intention of shipping the grain to Minneapolis. The grain is placed in the elevator for shipment, and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the state of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain—Minneapolis, Duluth, or elsewhere. This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Embden is outside the state of North Dakota, and it is an unusual thing to get an offer from a point within the state. After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under Federal law.

"That such course of dealing constitutes interstate commerce, there can be no question. This Court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle. *Dahnke-Walker Mill Co.* v. *Bondurant*, decided December 12, 1921 (257 U. S. 282, ante, 239, 42 Sup. Ct. Rep. 106). In that case the facts disclose that a company organized in Tennessee, and carrying on business there, went into Kentucky, and, through an agent there bought wheat for shipment to the company's mill in Tennessee. The State Court

held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee Company amenable to the regulatory statutes of the State. This Court rejected the conclusion of the State Court, and held that the buying, no less than the selling, of grain, under such circumstances, was a part of interstate commerce, committed to national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions of this Court, cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the effect to control and burden interstate commerce.

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and Federal authority under facts presented, which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of Federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate

character of the transactions. *Swift & Co.* v. *United States,* 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276; *Eureka Pipe Line Co.* v. *Hallanan,* decided by this Court December 12, 1921 (257 U. S. 265, ante, 227, 42 Sup. Ct. Rep. 101); and *United Fuel Gas Co.* v. *Hallanan,* decided the same day (257 U. S. 277, ante, 234, 42 Sup. Ct. Rep. 105)."

Further, note *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 290, 66 L. Ed. 243, where it was said:

"The commerce clause of the Constitution, Art. 1, Sec. 8, Cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purpose of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. *Brown* v. *Maryland,* 12 Wheat. 419, 446, 447, 6 L. Ed. 678, 688, 689; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519, 48 L. Ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. *American Exp. Co.* v. *Iowa,* 196 U. S. 133, 143, 49 L. Ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton* v. *Missouri,* 91 U. S. 275, 280, 23 L. Ed. 347, 349; ' "Commerce" is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities.' In *Kidd* v. *Pearson,* 128 U. S. 1, 20, 32 L. Ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it was tersely

said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13, 39 L. Ed. 325, 329, 15 Sup. Ct. Rep. 249, 'contracts to buy, sell, or exchange goods to be transportated among the several states' were declared 'part of interstate trade or commerce.' And in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 241, 44 L. Ed. 136, 147, 20 Sup. Ct. Rep. 96, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last.

"A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. *Crutcher* v. *Kentucky*, 141 U. S. 47, 57, 35 L. Ed. 649, 652, 11 Sup. Ct. Rep. 851; *Western U. Teleg. Co.* v. *Kansas*, 216 U. S. 1, 27, 54 L. Ed. 355, 366, 30 Sup. Ct. Rep. 190; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 112, 54 L. Ed. 678, 687, 27 L. R. A. (N. S.) 493, 30 Sup. Ct. Rep. 481, 81 Ann. Cas. 1103; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 59 L. Ed. 193, 35 Sup. Ct. Rep. 57."

In *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S. 294, 66 L. Ed. 625, it was said:

"The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so

directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and, in fact, distinctly affect, it."

In *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U. S. 136, 66 L. Ed. 170, on appeal from this Court, the Supreme Court said specifically:

*"After the seed has been committed to a carrier for interstate transport, * * * it passes from the regulatory power of the state into interstate commerce and under the national power."*

Here, pursuant to the commerce clause, the Congress has created this National Warehouse as a means whereby that requisite for national welfare may be conserved, and that by this warehouse done is by the United States strictly regulated, and 75 per cent of its contents is that already under bill of lading flowing in interstate commerce and quoad the remainder of 25 per cent this appellant is but an instrumentality requisite for that which is essential to move the cotton.

But it may be contended that as to this movement in this warehouse that the state may thereover assert whatever power is requisite as to intrastate commerce, but our position is, first, that nothing therein is intrastate commerce, as the entire movement has been subordinated to Federal Power, but if any portion be, then as to that portion the tax is general, covering every bale, and so being is thereby void.

Bowman v. *Continental Oil Co.*, 256 U. S. 646, 65 L. Ed. 1144, where it was declared:

"If the statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, includ-

ing interstate commerce as well as domestic; and the tax is void under authority of *Leloup* v. *Mobile*, 127 U. S. 640, 647, 32 L. Ed. 311, 314, 3 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58, 59, 35 L. Ed. 649, 652, 653, 11 Sup. Ct. Rep. 851; *Williams* v. *Talladega*, 226 U. S. 404, 419, 57 L. Ed. 275, 281, 33 Sup. Ct. Rep. 116; and other cases of that character."

In *Shafer* v. *Farmers Grain Co.*, 268 U. S. 198, 69 L. Ed. 914, it is said:

"Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nationwide. The right to buy it for shipment and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution."

See, also *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 334, 69 L. Ed. 982.

In *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 565, 69 L. Ed. 443, it is said:

"The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done, and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial, and extends to whatever is

necessary to the complete enjoyment of the right protected. *Heyman* v. *Hays, supra,* p. 186 (59 L. Ed. 531, 35 Sup. Ct. Rep. 403)."

So that thus under the circumstances done in Mississippi requisite for the movement of the interstate shipment did not subordinate same to state power. Compare *Flanagan* v. *Federal Coal Co.,* 267 U. S. 222, 69 L. Ed. 583; *Binderup* v. *Pathe Exch.,* 263 U. S. 291, 309, 68 L. Ed. 308, 316, 44 Sup. Ct. Rep. 96; *Texas Transport, etc.* v. *New Orleans,* 264 U. S. 150, 68 L. Ed. 611; *Southeastern Express Co.* v. *Miller,* 264 U. S. 540, 68 L. Ed. 841; *Atchison, T. & S. F.* v. *Harold,* 241 U. S. 371, 60 L. Ed. 1050.

In *Pennsylvania R. Co.* v. *Commission,* 250 U. S. 566, 63 L. Ed. 1143, the Court declared:

"Where the United States has exercised its exclusive power over interstate commerce so far as to take possession of the field the states no more can supplement its requirements than they can annul them."

Compare *Western Oil Refining Co.* v. *Lipscomb,* 244 U. S. 346, 61 L. Ed. 1181.

This warehouse was thus a Federal instrumentality, regulated and requisite, and so being, the state could not tax that therein done, because it was powerless to prohibit.

This question as to whether this be taxable as a Federal instrumentality was considered by the Court indirectly in *Independent Gin, etc.* v. *Dunwoody,* 30 F. (2d) 307, 40 Fed. (2) 1, and the conclusion there expresed was:

"The District Court, as appears from a memorandum opinion in the record, reached the conclusion that Congress did not intend to occupy the whole field as to the storing, etc., of agricultural products moving in interstate and foreign commerce and did not intend to exclude the jurisdiction of the states in regulating agri-

cultural warehouses and warehousemen, even though such regulations should tend to affect interstate or foreign commerce. We concur in this holding. *Merchants' Exchange* v. *Missouri*, 248 U. S. 365, 39 S. Ct. 114, 63 L. Ed. 300; *American Manf. Co.* v. *St. Louis*, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084."

It is true that there are certain declarations as to the validity of a tax under this Act sought to be imposed, but the remedy in equity was denied properly in *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 74 L. Ed. 737, and the contention herein made is directly supported by the decisions of the Federal Supreme Court, to which reference has been made, and compare, especially, *People* v. *Perry*, quoted *supra*.

In *Jaybird Mining Co.* v. *Wier*, 271 U. S. 609, 70 L. Ed. 1114, it was held:

"It is elementary that the Federal Government in all its activities is independent of state control. This rule is broadly applied. And without congressional consent no Federal agency or instrumentality can be taxed by state authority. 'With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *M'Cullock* v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579.' *Johnson* v. *Maryland*, 254 U. S. 51, 55, 65 L. Ed. 126, 128, 41 Sup. Ct. Rep. 16. And see *Farmers' & M. Bank* v. *Minnesota*, 232 U. S. 516, 58 L. Ed. 706, 34 Sup. Ct. Rep. 354; *Choctaw, O. & G. R. Co.* v. *Harrison, supra; Gillespie* v. *Oklahoma*, 257 U. S. 501, 505, 66 L. Ed. 338, 340, 42 Sup. Ct. Rep. 171.

"This court has considered a number of cases quite like the one now before us. In *Choctaw, O. & G. R. Co.* v. *Harrison, supra*, there was an agreement by the United States that coal lands belonging in common to the members of the Choctaw and Chickasaw tribes should be mined, and that the royalties should be used

for the Indians. The state imposed a tax equal to 2 per centum on the gross receipts from the total production of coal from the mine. It was held that it was an occupation or privilege tax, and that one having a mining lease made in furtherance of the governmental purpose could not be subjected to that burden. In *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522, 60 L. Ed. 779, 36 Sup. Ct. Rep. 453, it was held that oil leases of land made by the Osage Tribe were under the protection of the Federal government, and that the state could not tax such leases either directly or as represented by the capital stock of the corporation owning them. It was said (p. 530): 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, * * *'. In *Howard* v. *Oil Companies*, 247 U. S. 503, 62 L. Ed. 1239, 38 Sup. Ct. Rep. 426, this court affirmed, per curiam, the judgment of the United States district court for the western district of Oklahoma enjoining the enforcement of a tax imposed by the state on the gross value of the production of oil and gas, less the royalty, under leases upon Osage lands made for the benefit of the Indians. In *Large Oil Co. v. Howard*, 248 U. S. 549, 63 L. Ed. 416, 39 Sup. Ct. Rep. 183, this court reversed, per curiam, the judgment of the supreme court of Oklahoma (63 Okla. 143, 163 Pac. 537) sustaining a tax on gross value of production of petroleum and gas, less the royalty interest, where the owner of the property sought to be taxed was engaged under the authority of the Secretary of the Interior in the production of oil and tribal lands of the Osage Nation. And in *Gillespie* v. *Oklahoma, supra*, it was held that the net income derived by a lessee from the sale of his share of the oil and gas received under leases of restricted Creek and Osage lands could not be taxed by the state. In each of these cases the tax was condemned as an

attempt to tax an instrumentality used by the United States in fulfilling its duties to the Indians."

The Court of Appeals, in *Matthews* v. *Rogers*, *supra*, held directly that such a tax as is here involved could not be imposed.

In *New Jersey Bell Tel. Co.* v. *Board*, 280 U. S. 346, 74 L. Ed. 467, the Supreme Court declared:

> "But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end. *Pullman Co.* v. *Richardson*, 261 U. S. 330, 338, 67 L. Ed. 682, 686, 43 Sup. Ct. Rep. 366, and cases cited; *Sprout* v. *South Bend*, 277 U. S. 165, 171, 72 L. Ed. 833, 837, 62 A. L. R. 45, 48 Sup. Ct. Rep. 502. This tax can not be sustained if it is not upon the property, but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereupon."

T. & N. O. R. Co. v. *Brotherhood*, 281 U. S. 570, 74 L. Ed. 1046. *Di Santo* v. *Pennsylvania*, 273 U. S. 37, 71 L. Ed. 527; *McFadden Rice Milling Co.* v. *T. & N. O. Ry. Co.* (Tex.), 277 S. W. 193; *Miller* v. *Illinois Cent. R. Co.*, 111 So. 558, 146 Miss. 422.

We therefore submit that in this cause, the same should be reversed and remanded.

Respectfully submitted,

MARCELLUS GREEN,
GARNER W. GREEN,
FORREST B. JACKSON,
Attorneys for Appellant.

APPENDIX A.

The Interstate Commerce Commission, in I. C. C. Docket No. 14940, said:

> "Cotton, after being harvested, is ginned and usually sold by the producer at practically every local station in the cotton-producing section. The buyers assemble or concentrate it at points best suited for the particular merchant's convenience, where facilities are maintained for its merchandising and storage. Merchandising includes grading and arranging in lots of even running grade and staple, sampling and resampling, tagging, marking, patching, reconditioning, rebaling and assembling in shipment lots. It is usually sold by the cotton merchants in multiples of 100 bales of even grade and staple and in order to assemble lots of that size it is necessary to concentrate it. In former years cotton was principally concentrated at a few interior points, such as St. Louis, Mo., and Memphis, Tenn., and at the ports, including New Orleans and Galveston. It was then shipped by the farmer producer, or interior general merchant who frequently financed the growers, to commission merchants or cotton factors at the large markets where it was sold. After the many expenses incident to transportation and merchandising had been deducted, little proceeds were left for the grower. Now the producer usually sells his cotton at his nearest local station, where buyers compete for its purchase, and the producer knows at the time it leaves his hands the price he is to receive. As the interior concentration points increased in number, the facilities for handling the crop, particularly those for storage, greatly improved. It is represented by experienced cotton producers, cotton merchants, and bankers that the concentration of cotton at interior points has been helpful to the growers, merchants handling cotton or general merchandise, and banking institutions, has created many important cotton markets and has promoted the general prosperity of the cotton-producing territory. Concentra-

tion has been also of substantial advantage to the carriers as it increases the car loading beyond the transit points, conserves equipment when it is in greatest demand, and thus promotes economy of operation.

"The services rendered by the carriers in the concentration of cotton are generally the same as on other traffic accorded transit. The inbound shipments are switched to the warehouse or compress, notice of arrival is given and inbound freight charges are collected. *When the shipments are forwarded to final destination the outbound rates are collected, but subsequently the total charges are adjusted to the basis of the through rates from origin to destination, plus other charges such as for out-of-line or back-haul services.* The services of the carrier in handling cotton for *compression* are substantially the same as for *concentration* in so far as the movement into and out of the concentration or compress points is concerned, but, when the cotton is compressed, the compress companies are required to unload and load the cars. When cotton is concentrated at the point where the carrier compresses it, the service rendered by the carrier is materially less than where concentration and compression take place at different points.

"Compression of cotton was first inaugurated at the ports, primarily in the interest of increasing the loading of ships. The charges for such compression at that time were either paid by the *water carrier* or the rates on such cotton *were made sufficiently lower* than on gin baled or flat cotton to warrant compression by the shipper. Subsequently, the rail carriers recognized that it was more economical to handle compressed than flat cotton and compresses were located at interior points. In the beginning, the interior compresses were either *operated* or *controlled* by the railroads; in some instances they were owned by the railroads and in others by railroad officials. Ultimately, the ownership of the compresses changed and it is testified that those in this territory are now operated by interests in no

way associated with or controlled by the railroads or their officials."

APPENDIX B.

In *People* v. *Perry* (Cal.), 291 Pac. 237, there was at issue as to the deciduous fruit precisely that now here at issue and there that Court said:

> "It is a matter of common knowledge, of which this court will take judicial notice, that the cultivation and production of deciduous fruit in this state is one of its largest and most important industries and one in which millions of dollars have been invested, and from which thousands of its citizens derive the means of their subsistence. The statute under consideration does not purport to operate upon persons dealing in fruit purchased for consumption or processing within this state. It must therefore operate upon those dealing in that surplus of this product beyond that required for local consumption and processing and which would necessarily enter the channels of interstate commerce, and upon that class, and that class alone, would this statute operate.
>
> "Assuming, then, in construing the amended information before us, that the fruit purchased by the defendant was designated for shipment into another state or a foreign country, we are confronted with the question as to the precise point in this transaction it would cease to be an intrastate transaction and assume an interstate character and become subjected to regulations prescribed by Congress. Appellant contends that the purchase having been consummated, and the title and possession having been transferred to the defendant as a cash buyer, the transaction was closed, and that the same did not partake of the character of an interstate transaction. But we cannot accede to this view. The rule is well settled that when, in the due course of business, the products of a state are purchased therein for the purpose and with the design of transferring and utilizing the same in another state,

that the initial act of a consummated purchase, and resulting change of title and possession together with all subsequent transactions including transportation and delivery at its destination, is an interstate transaction. In the case of *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 108, 66 L. ed. 239, the Supreme Court of the United States said:

"'Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown* v. *Maryland*, 12 Wheat. 419, 446-447, 6 L. ed. 678; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519, 24 S. Ct. 365, 48 L. ed. 538. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. *American Express Co.* v. *Iowa*, 196 U. S. 133, 143, 25 S. Ct. 182, 49 L. ed. 417. This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton* v. *Missouri*, 91 U. S. 275, 280, 23 L. ed. 347: ' 'Commerce' is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all of its forms, including transportation, purchase, sale, and exchange of commodities.'

"'In *Kidd* v. *Pearson*, 128 U. S. 1, 20, 9 S. Ct. 6, 10, 32 L. ed. 346, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.'

"'In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13, 15 S. Ct. 249, 254, 39 L. ed. 325,' 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.'

"In the case of *Farmers' Grain Co.* v. *Langer* (C. C. A.) 273 F. 635, 636, 19 A. L. R. 148, after reviewing many decisions of the United States Supreme Court in which this question was involved, the court concludes that the purchases of grain by dealers in North Dakota

for shipment to terminal markets in another state are a part of the unit of interstate commerce involved in the shipments. And the Supreme Court of the United States, in *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 42 S. Ct. 244, 247, 66 L. ed. 458, in reviewing the decision of *Farmers' Grain Co.* v. *Langer, supra,* said: 'Nor will it do to say that the state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. *Pennsylvania Railroad Co.* v. *Clark Brothers Coal Mining Co.*, 238 U. S. 456, 468, 35 S. Ct. 896, 59 L. ed. 1406.'

"We conclude, therefore, that the purchase of fruit involved in this case was an interstate transaction and one subject to the control of Congress."